

James Morgan, Executor in Trust for the Children of Michael Rackett, Appellant. | Elizab. Digby, Administratrix of John Digby, Respondent.

The Appellants CASE.

IN the Year 1686, the said Michael Rackett and John Digby, with Phineas Bowles, became Partners in certain Glass-Works, and the said Mr. Digby being then under some uneasie Circumstances in the World did to protect his Estate, by Deed Dated 30th of Octo. 1688. (for the Consideration therein mentioned) Assigned all his Interest to Rackett without any Proviso, Trust, or Condition for Redemption thereof, and soon after went beyond Sea, and Rackett with Bowles carried on the Undertaking until 1692, and then they Sold their Joynt-Stock, (whereby that Partnership was Determined) and also then Sold Two Glass-Works of their own wherein Digby had no Interest, (but Rackett had a seperate Stock therein, to the Value of 1799 l. 10 s. and Bowles a seperate Stock to the Value only of 402 l. 11 s. 04 d.) To Craven Howard, Esq; and others, for 11161 l. 15 s. 10 d. and thereupon by Indenture Dated April 1st, 1692. It was agreed that all the said Works and Stock, as well those in Partnership with Digby as those of their own, together with other Glass-Works and Stock of one Hooke should be Vested in Howard and others, and that the same should be divided into 1440 Shares, and that 356 of the said Shares called Gift-Shares, should be Transferred to Bowles for the Benefit of himself and Rackett, which was accordingly done, 45 only of which afterwards were Transferred to Rackett, who in Consideration thereof Covenanted not to be concerned in any Glass-Works upon Forfeiture of 10 l. per Day.

THAT at a Meeting in April, 1692. for the better Disposal of 364 Shares, called Stock-Shares, wherein Digby was concerned; It was agreed that each of the Proprietors should take so many as he thought fit, at 40 l. per Share, and accordingly Bowles for himself and Partners Subscribed for 66 towards Payment for their Stock, of which Six were Sold, and the Money accounted for, and Forty were Transferred to Rackett for himself and Digby, whereby there were 20 due to each.

THAT in 1692, Digby returned into England, and was made acquainted with Rackett's selling the said Stock, and accepting the said Shares; and in 1694, made up an Account thereof with him, and from the time of his Return to the time of Rackett's Death was very conversant with him and frequently at his House, and privy to his Selling and Disposing of his own Shares, and during all Rackett's Life, Digby never pretended to be any way Intitled to any the Money made by Rackett by Profit or Sale of any such Shares, as he sold as his own, after the return of the said Digby.

THAT in 1697, Rackett dyed, having made his Will, and the Appellant and one Edmund Perkins (since Deceased) and others, Executors in Trust for the Children of the said Rackett, but the Appellant and Perkins only proved the Will, and after Rackett's Death, Digby pretending to Claim some Right or Interest in some Part or Proportion of the said Shares so sold by Rackett, and that there was an Account depending between him and Rackett for Moneys by Rackett Received and Paid on Account of the said Stock since May 1694. The Appellant for clearing the said Matters, and to avoid any Suits, permitted Mr. Digby and his Agents to inspect all Mr. Rackett's Books of Accounts, and accordingly an Account was drawn out from the said Books of all Mr. Rackett's Receipts and Payments, upon which including the Ballance of the Account of May 1694. there appeared due to Mr. Digby 415 l. 3 s. 7 d. which notwithstanding he had made such absolute Assignments of his Interest in the said Stock to Rackett, yet the Appellant offered to Pay and to transfer to him his Proportion of the said Shares remaining Unsold.

THAT Digby having kept his 20 Shares till they were come to little or no Value, and upon perusal of Rackett's Books, finding that Mr. Rackett had disposed of most of his Shares to Advantage, as Mr. Rackett had often pressed Digby to do for his Shares; yet hoping (Rackett being Dead) to gain an equal Benefit, notwithstanding his own Remissness before. He in 1700, Exhibited his Bill for a discovery of the Trust as he Pretended, and which was never denied by the Appellant, and for an Account of the Profits made by Rackett since the Partnership determined, and to have his Proportion thereof, and the Cause coming to be Heard 29th June, in the Fourth Year of Her Majesty's Reign. It was referred to a Master, to see how many Shares in the said Stock, came to Rackett's Hands, upon his own and Digby Joynt-Accounts, and how many upon his own seperate Account, and to see what had been made thereof; and the Master accordingly persuant to the said Decree, and several subsequent Orders of the said Court, made several Reports, and the Cause coming again at several times to be Heard upon the said Reports, and Exceptions taken by both Sides thereto, the Appellant was and is ordered to pay (accounting for Interest) to the 20th May last, the Sum of 1693 l. 18 s. 00 d. And the Respondent by the said Orders and Decrees is let into the equal Proportion with Rackett of the said 45 Gift-Shares so transferred to him upon his own private Account as aforesaid; and the Appellant is also to pay the Respondent 546 l. for a Moiety of 37 Shares Sold by Rackett, when Digby might have Sold all his Share if he had thought fit, and also 166 l. 00 s. 11 d. for a Moiety of several Sums by him taken for refusal of Shares which was upon Rackett's own private Account and Risque, and also with 239 l. 5 s. for a Moiety of the pretended Value of 33 Shares Transferred to one Blunt and others, whereof the Appellant's Testator had no manner of Benefit. And by a subsequent Order or Decree made the 18th day of June last, the Appellant was Ordered to pay the said Sum of 1693 l. 18 s. with further Interest at such times as thereby appointed, and in Obedience to which the said Appellant hath been Compelled to pay 1050 l. in part hereof, or otherwise was thereby to stand Committed to the Prison of the Fleet.

From which several Orders and Decrees the Appellant has Appealed.

For that the Respondant Intestate, having the full Value of his Interest in the said Stock, Answered to him, and the said 45 Shares being given to Rackett (as other Shares were to several other Persons) for particular Services done to the New Company. And in Consideration of his restraining himself from being concerned in any other Glass-Work, Digby ought not to have been let into any Proportion thereof, or at least ought not to have been let into an equal Proportion with Rackett, who had a seperate Stock of his Own of a Considerable Value Sold at the same time, and no other Allowance made for the same.

Also, for that the Respondent ought not to have been let into any Part of the Money by Rackett taken for Refusal of Shares, the same being taken upon his own private Risque and Account, nor of the Money for which he Sold any of his own Shares, the Respondent's Testator having obstinately refused to Sell his Shares when they might have been Disposed of to the same Advantage.

And also, for that Rackett who was only a Trustee, and as such, ought only to Account for what he actually Received, ought not to have been Charged with any Thing, for, or in respect of the said 33 Shares, nothing in Truth being Received thereon, nor were the same at that time of any Intrinsick Value, nor ought the Appellant to have been Charged with Interest for the Ballance of the Account of May 1694, from that time the same being liable to be, and accordingly was Drawn out by Digby when he thought fit, and Rackett was only in the Nature of his Cashire, and had no Allowance for his Trouble and Pains, tho by his Care and Management during the absence of Digby, the Joint-Stock was advanced from 4000 l. to 9059 l. 14 s. 6 d. whereby Digby for his Share gained, 1686 l. 11 s. 6 d.

For which Causes, and several other Reasons, It is humbly hoped Your Lordships will see Just Cause to Reverse the said Decree.

SIM. HARCOURT.